81-5157

Supreme Court, U.S.
FILED
JUL 23 1981
Alexander L. Stevas, Clerk

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1981
No. 81-_____

WESLEY H. PEERY,
Petitioner,
vs.
THE STATE OF NEBRASKA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES

STANLEY D. COHEN
4730 Meredeth
Lincoln, Nebraska 68506

Attorney for Petitioner

## INDEX


| | Page |
|---|---|
| OPINIONS BELOW | iii |
| JURISDICTION | iii |
| QUESTIONS PRESENTED | iii |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 1 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR GRANTING THE WRIT | 4 |
| Introduction | 4 |
| I. FAILURE TO REVIEW AND COMPARE APPELLANT'S CASE WITH ALL OTHER CRIMINAL HOMICIDES AS MANDATED BY LB 711, CODIFIED AT NEB. REV. STAT. §29-2521.01 TO 29-2521.04, DEPRIVES PETITIONER OF DUE PROCESS AND EQUAL PROTECTION OF THE LAWS UNDER THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION. | 4 |
| II. THE ARBITRARY AND CAPRICIOUS INFLICTION OF THE DEATH PENALTY IN THE INSTANT CASE CONSTITUTES CRUEL AND UNUNSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT TO THE U.S. CONSTITUTION AND UNDER ARTICLE I, SECTION NINE OF THE NEBRASKA CONSTITUTION. | 14 |
| APPENDICES: | |
| A. State v. Peery - Opinion of Nebraska Supreme Court, 208 Neb. 639, ___ N.W.2d ___ (1981) | |

# TABLE OF AUTHORITIES

## CASES


| | Page |
|---|---|
| A-1 Finance Co., Inc. v. Nelson, 165 Neb. 296, 306 N.W.2d 687 (1957). | 13 |
| Furnam v. Georgia, 408 U.S. 238 (1972). | 4 |
| Godfrey v. Georgia, ___ U.S. ___, 100 S. Ct. 1759 (1980). | 15 |
| Gregg v. Georgia, 428 U.S. 153 (1976). | 6, 14 |
| Heywood v. Brainard, 181 Neb. 294, 147 N.W.2d 772 (1967). | 9 |
| Sovereign Camp, W.O.W. v. Casados, 21 F. Supp. 989 (D.N.M. 1938). | 5 |
| State v. Braasch, 196 Neb. 240, 242 N.W.2d 119 (1976). | 11 |
| State v. Brown, Docket 88, Page 625 (D. Ct. Douglas Co. 1974). | 10 |
| State v. Harper, 208 Neb. 569, ___ N.W.2d ___ (1981). | 7 |
| State v. Scott, 200 Neb. 265, 263 N.W.2d 659 (1978). | 9 |
| State v. Marshall, Doc. 48, p. 262 (D. Ct. Lancaster Co. 1978). | 10 |
| State v. Peery, 199 Neb 656, 261 N.W.2d 95 (1977), cert. denied, 439 U.S. 882, 99 S. Ct. 220, 58 L. Ed. 2d 194 (1978) | 2 |
| State v. Price, 202 Neb. 308, 275 N.W.2d 82 (1979). | 11 |
| State v. Prim, 201 Neb. 279, 267 N.W.2d 193 | 9 |
| State v. Rowert, Case No. 2805 (D. Ct. Platte Co. 1977). | 10 |
| State v. Schaeffer, Docket 28, Page 279 (D. Ct. Hall Co. 1977). | 10 |
| State v. Simpson, 200 Neb. 823, 265 N.W.2d 681 (1978). | 10 |
| State v. Walker, 197 Neb. 314, 248 N.W.2d 758 (1976). | 11 |
| State v. Welsh, 202 Neb. 249, , 275 N.W.2d 54 (1979) | 8, 12 |
| State v. Williams, 205 Neb. 56, 287 N.W.2d 18 (1979). | 6, 7, 12 |
| State v. Yarbrough, 199 Neb. 41, 255 N.W.2d 874 (1977). | 11 |


## CONSTITUTION


| | |
|---|---|
| Eighth Amendment to the United States Constitution | 14, 16 |
| Fourteenth Amendment to the United States Constitution | 4, 5, 7 |
| Article I, Section Nine of the Nebraska State Constitution | 4, 16 |


## STATUTES


| | |
|---|---|
| Neb. Rev. Stat. §29-3001 (Reissue 1979) | 1, 14 |
| Neb. Rev. Stat. §§29-2521.01 - .04 (Reissue 1979) | 1, 4, 6, 9 |


## OTHER AUTHORITIES


| | |
|---|---|
| Black's Law Dictionary (Revised 5th ed., 1979) | 12 |

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1981
No. 81-_____

| | |
|---|---|
| WESLEY H. PEERY, | ) |
| Petitioner, | ) |
| vs. | ) |
| THE STATE OF NEBRASKA, | ) |
| Respondent. | ) |

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Nebraska entered April 24, 1981.

OPINION BELOW

The opinion of the Supreme Court of the State of Nebraska in the case of Wesley H. Peery is reported at 208 Neb. 639, ___ N.W.2d ___ (1981), attached hereto as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under 28 USC 1257 (3), Petitioner having asserted below and is asserting here a deprivation of their rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether Petitioner is entitled to have his sentence of death set aside pursuant to Nebraska's Post Conviction Relief Act, Neb. Rev. Stat. §29-3001 et. al. as his constitutionally guaranteed rights of due process and equal protection of the laws were impaired by the failure of the Supreme Court of the State of Nebraska to effectuate special review procedures set forth by §§29-2521.01 to .04 (Reissue 1979).

2. Whether the death sentence imposed in the instant case was rendered in an arbitrary and capricious manner contrary to the United States Supreme Court holdings reached in Gregg v. Georgia and violative of the Eighth Amendment to the United States Constitution.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involved the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the provisions of Nebraska law as follows:

Neb. Rev. Stat. §29-2521.01 (Reissue 1979). Legislative findings. The Legislature hereby finds that:
(1) Life is the most valuable possession of a human being, and before taking it, the state should apply and follow the most scrupulous standards of fairness and uniformity;
(2) The death penalty, because of its enormity and finality, should never be imposed arbitrarily nor as a result of local prejudice or public hysteria;
(3) State law should be applied uniformly throughout the state and since the death penalty is a statewide law an offense which would not result in a death sentence in one portion of the state should not result in death in a different portion;
(4) Charges resulting from the same or similar circumstances have, in the past, not been uniform and have produced radically differing results; and
(5) In order to compensate for the lack of uniformity in charges which are filed as a result of similar circumstances it is necessary for the Supreme Court to review and analyze all criminal homicides committed under the existing law in order to insure that each case produces a result similar to that arrived at in other cases with the same or similar circumstances.

Neb. Rev. Stat. §29-2521.02 (Reissue 1979). Criminal homicide cases; review and analysis by Supreme Court; manner. The Supreme Court shall within a reasonable time after July 22, 1978, review and analyze all cases involving criminal homicide committed on or after April 20, 1973. Such review and analysis shall examine (1) the facts including mitigating and aggravating circumstances, (2) the charges filed, (3) the crime for which defendant was convicted, and (4) the sentence imposed. Such review shall be updated as new criminal homicide cases occur.

Neb. Rev. Stat. §29-2521.03 (Reissue 1979). Criminal homicide cases; appeal, sentence; Supreme Court review. The Supreme Court shall, upon appeal, determine the propriety of the sentence in each case involving a criminal homicide by comparing such case with previous cases involving the same or similar circumstances. No sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances. The Supreme Court may reduce any sentence which it finds not to be consistent with sections 29-2521.01 to 29-2521.04, 29-2522, and 29-2524.

Neb. Rev. Stat. §29-2521.04 (Reissue 1979). Criminal homicide cases; Supreme Court review and analyze; district court; provide records. Each district court shall provide all records required by the Supreme Court in order to conduct its review and analysis pursuant to sections 29-2521.01 to 29-2521.04

Neb. Rev. Stat. §29-3001 (Reissue 1979). Post conviction; motion; procedure; costs. A prisoner in custody under sentence and claiming a right to be released on the ground that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, may file a verified motion at any time in the court which imposed such sentence, stating the grounds relied upon, and asking the court to vacate or set aside the sentence.

Unless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall cause notice thereof to be served on the county attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial as may appear appropriate. Proceedings under the provisions of sections 29-3001 to 29-3004 shall be civil in nature. Costs shall be taxed as in habeas corpus cases.

A court may entertain and determine such motion without requiring the production of the prisoner, whether or not a hearing is held. Testimony of the prisoner or other witnesses may be offered by deposition. The court need not entertain a second motion or successive motions for similar relief on behalf of the same prisoner.

STATEMENT OF THE CASE

Petitioner Wesley H. Peery was found guilty by a jury on April 30, 1976 in the District Court of Lancaster County, Nebraska of murder and robbery by force. A three-judge sentencing panel sentenced Petitioner to death on the murder count and the trial judge sentenced Petitioner to a term of not less than 16 nor more than 50 years imprisonment on the robbery count, the sentences to run consecutively.

Petitioner appealed his sentence of death to the Supreme Court of the State of Nebraska challenging the constitutionality of his conviction on circumstantial evidence and the prejudicial misconduct of the prosecuting attorney. On December 28, 1977, the Supreme Court of the State of Nebraska affirmed Petitioner's death sentence State v. Peery, 199 Neb. 656, 261 N.W.2d 95 (1977). Thereupon, Petitioner appealed the Nebraska Supreme Court's decision by application of Writ of Certiorari to the United States Supreme Court. Petitioner's application was denied by the United States Supreme Court on October 2, 1978.

Pursuant to Nebraska's Post Conviction Relief Act, ante Petitioner perfected an appeal to the District Court of Lancaster County, Nebraska. Specifically, Petitioner asserted rights to relief under the Nebraska Post Conviction Act as his constitutionally guaranteed rights of due process and equal protection of the laws was impaired by the failure of the Nebraska Supreme Court to pro-

perly effectuate statutorily prescribed review procedures of homicide cases as set forth by Neb. Rev. Stat. §§29-2521.01 to 29-2521.04 (Reissue 1979). The District Court denied Petitioner's motion for post conviction relief. On April 24, 1981, the Supreme Court of the State of Nebraska affirmed the District Court decision.

## REASONS FOR GRANTING THE WRIT

### INTRODUCTION

A motion for post conviction relief under Neb. Rev. Stat. §29-3001 may be granted when there is a "denial or infringement of rights of the prisoner which renders the judgment void or voidable under the constitution of this state or the Constitution of the United States." Pursuant to the Post Conviction Act, Petitioner herein contends that he is entitled to have his sentence set aside due to infringement of his constitutionally guaranteed rights under due process and equal protection of the laws under the 14th Amendment of the United States Constitution and Article I, section nine of the Nebraska State Constitution. The grounds which constitute impairment of Petitioner's constitutional rights consist of the following:

> (1) that legislatively mandated procedures which require review and comparison of Petitioner's case will all other homicide cases to determine whether his sentence is proportionate with other cases involving same or similar circumstances have not been properly effectuated; (2) that the imposition of the death penalty in the instant case is a disportionately greater sentence than that imposed in cases with the same or similar circumstances contrary to Nebraska law and violative of Petitioner's rights to equal protection of the laws.

The scope of review provided for in sections 29-2521.01 to 29-2521.04 clearly goes beyond review of aggravating and mitigating circumstances. Rather these statutes operate independently of other procedural safeguards in order to insure the non-arbitary infliction of the death penalty.

### I.

> FAILURE TO REVIEW AND COMPARE PETITIONER'S CASE WITH ALL OTHER CRIMINAL HOMICIDES AS MANDATED BY LB 711, CODIFIED AT NEB. REV. STAT. §§29-2521.01 TO 29-2521.04, DEPRIVES PETITIONER OF DUE PROCESS AND EQUAL PROTECTION OF THE LAWS UNDER THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In Furnam v. Georgia, 408 U.S. 238 (1972) the United States Supreme Court held that "the penalty of death may not be imposed under sentencing procedures that create a substantial risk that punishment will be inflicted in an arbitrary and capricious manner." To prevent the random imposition of the death penalty, the United

States Supreme Court has further held that the constitutional imposition of capital punishment requires a sentencing scheme which "provides a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not." Id. at 313. In order to provide a "meaningful basis" from which to make this distinction as required by the United States Supreme Court, the Nebraska Legislature enacted LB 711 in 1978. Specifically, section 29-2521.01(5) provides that:

> In order to compensate for the lack of uniformity in charges which are filed as a result of similar circumstances it is necessary for the Supreme Court to review and analyze all criminal homicides committed under the existing law in order to insure that each case produces a result similar to that arrived at in other cases with the same or similar circumstances. (emphasis supplied).

The Legislature's intent can be further gleaned from statutory language contained in section 29-2521.01(1) - (4), whereby the Legislature determined that:

> (1) Life is the most valuable possession of a human being, and before taking it, the state should apply and follow the most scrupulous standards of fairness and uniformity;
>
> (2) The death penalty, because of its enormity and finality, should never be imposed arbitrarily nor as a result of local prejudice or public hysteria;
>
> (3) State law should be applied uniformly through the state and since the death penalty is a statewide law an offense which would not result in a death sentence in one portion of the state should not result in death in a different portion;
>
> (4) Charges resulting from the same or similar circumstances have, in the past, not been uniform and have produced radically differing results:

Failure to review Petitioner's conviction and sentence of death in accordance with statutorily prescribed review and analysis of all criminal homicide cases committed on or after April 20, 1973 deprives Petitioner of due process and equal protection of the laws under the 14th Amendment to the United States Constitution. The guarantee of equal protection under the law contemplates that "(e)qual protection and security shall be given to all under like circumstances in his life, his liberty, and his property, and in the pursuit of happiness and in the exemption from any greater burdens and charges than are equally imposed upon all others under like circumstances." (emphasis added). Sovereign Camp W.O.W. v. Casados, 21 F.

Supp. 989, 994 (D.N.M. 1938). Although Sovereign Camp involved the question of an inequitable assessment of taxes, the Court's articulation of the basic tenents of equal protection are readily applicable to the case at bar. As sections 29-2521.01 through 29-2521.04 envision, equal protection commands that individuals involved in like circumstances are similarly treated. The Nebraska Legislature recognized that "charges resulting from the same or similar circumstances have not, in the past, been uniform and have produced radically differing results." Neb. Rev. Stat. §29-2521.01(4). Therefore, Nebraska law requires that all criminal cases be reviewed, compared and analyzed to insure fairness and uniformity in inflicting the death penalty upon a given defendant. The Nebraska Supreme Court narrowly construed this statutory language in State v. Williams, 205 Neb. 56, 287 N.W.2d 18 (1979) by limiting review and comparison to only first degree murder convictions, which fails to give effect to clear and unambiguous statutory language and consequently deprives Petitioner of his constitutionally guaranteed right to be equally treated under the law.

Additionally, sections 29-2521.01 through 29-2521.04 clearly set forth precise procedures from which review and analysis of criminal homicide cases are to be made. The review procedure contemplated by the Nebraska Legislature provides an additional and very important mechanism to insure that Nebraska's capital sentencing scheme removes or at least minimizes the risk that the death penalty will be wantonly or freakishly imposed for discriminatory reasons. See Gregg v. Georgia, 428 U.S. 153, 224 (1976).

The aforementioned statutory provisions set forth a procedure whereby forms are provided by the State Court Administrator to County Attorneys who in turn file the reports with the State Court Administrator. These reports are to be compiled on an ongoing basis for purposes of comparison and review with subsequent homicide cases. Neb. Rev. Stat. §29-2521.02. The report, as statutorily determined, includes information essential to comparative review: (1) the initial charge filed; (2) any reduction in the initial charge and whether such reduction was the result of a plea bargain or some other reason; (3) dismissal prior to trial; (4) the

outcome of the trial including not guilty, guilty as charged, guilty of a lesser included offense or dismissal; (5) the sentence imposed; (6) whether an appeal was taken; and (7) such other information as may be required by the State Court Administrator. Neb. Rev. Stat. §29-2524.01.

Not all criminal homicide cases are filed with the State Court Administrator in compliance with state law. District Courts do not regularly comply with section 29-2521.04 to provide the requisite records to the Supreme Court for review which violates Petitioner's constitutional right of due process of law under the 14th Amendment of the United States Constitution. Neb. Rev. Stat. §29-2521.01 et. al. provides definite guidelines to insure that the death penalty shall not be arbitrarily imposed and provides a "meaningful basis" from which to distinguish homicides in which capital sentence was imposed from those cases in which it was not. As presently interpreted by the Nebraska Supreme Court and executed by the offices of County Attorneys and State Court Administrator, LB 711, which effectuates the constitutional guarantee of due process in regard to capital sentencing and review, fails to provide Petitioner due process of law as guaranteed under the 14th Amendment.

A. IN STATE V. WILLIAMS THE NEBRASKA SUPREME COURT FAILED TO FOLLOW THE INTENT AND CLEAR MEANING OF LB 711 BY INTERPRETING "ALL CRIMINAL HOMICIDES" TO MEAN ONLY FIRST DEGREE MURDER CONVICTIONS.

In determining whether the penalty of death imposed in the Williams case was excessive, the Nebraska Supreme Court examined the provisions of sections 29-2521.04 held that LB 711 "will be construed to require the Supreme Court to review and analyze only cases involving a conviction for first degree murder committed on or after April 20, 1973." (emphasis added), State v. Williams, supra., at 76. accord. State v. Harper, 208 Neb. 569, ___ N.W.2d ___ (1981). The Court limited their construction of LB 711's provision to review "all criminal homicides to first degree murder convictions in order to avoid "insurmountable constitutional problems" which were not discussed or clearly identified. The Court did, however, suggest that literal interpretation of "all criminal homicides" to include homicides that did not result in conviction of first degree murder

would create "problems relating to the exercise of prosecutorial discretion in homicide cases and the exercise by juries of the decisional power of determining guilt or innocence or fixing degrees of culpability in homicide cases." Id. at 75, 76.

Discussion of the scope and purpose of LB 711 during committee hearings specifically addressed the Court's concern. The bill was not designed to challenge the exercise of prosecutorial discretion nor the jury's determination of the degree of murder. The bill was solely enacted to provide a meaningful base of comparison from which a distinction could be made from cases in which the death penalty was imposed from those in which it was not in accordance with prior United States Supreme Court decisions.

In a case which involved the shooting death of a woman by her husband, State v. Welsh, 202 Neb. 249, 275 N.W.2d 54 (1979), the alleged constitutional problems raised by the Nebraska Supreme Court in the Williams decision were not identified by the Court in interpreting LB 711. In fact, in examining the legislative history of LB 711, the Court determined that:

> (T)he bill (LB 711) as a whole indicates conclusively that it was the intention of the introducers and the members of the Legislature to establish a system whereby the imposition of a death penalty in any given case would be compared to the failure to impose the death penalty in any other case in which first degree murder was charged. (emphasis added)

Id. at 253. The Nebraska Court continued their analysis of LB 711 by citing legislative debate which further elucidated the scope of the bill and supported the Court's determination of the Legislature's intent. The Court abandoned its interpretation of LB 711 in Williams, holding that the only cases which could be comparatively reviewed were those which resulted in a first degree conviction. The discrepancy between the Court's decisions in Welsh and Williams, both rendered in 1979, are irreconcilable. Clearly the Welsh decision reflects the expressly stated legislative purpose codified at Neb. Rev. Stat. §29-2521.01. See p. 7 infra.

B. THE NEBRASKA SUPREME COURT'S STATUTORY INTERPRETATION OF LB 711 DIRECTLY CONTRAVENES THE CLEAR AND UNAMBIGUOUS LANGUAGE OF SECTIONS 29-2521.01 THROUGH 29-2521.04 CONTRARY TO ESTABLISHED NEBRASKA LAW WHICH PROHIBITS JUDICIAL INTERPRETATION NOT INTENDED OR EXPRESSED BY THE LEGISLATURE.

Examination of the legislative history of LB 711 and the unambiguous langauge of the bill codified at section 29-2521.01 to 29-2521.04 clearly supports Petitioner's contention that the Nebraska Supreme Court exceeded its duty and power to interpret statutory language by narrowly construing said provisions. It is well established law in Nebraska that "if a statute is unambiguous, courts will not by interpretation or construction usurp the function of the lawmaking body and give it a meaning not intended or expressed by the Legislature." Heywood v. Brainard, 181 Neb. 294, 298, 147 N.W.2d 772 (1967). Sections 29-2521.01 through 29-2521.04 are unambiguous. The statutory language explicitly provides that "all criminal homicides" shall be reviewed and analyzed so as to insure the uniform application of the death penalty in Nebraska. The Nebraska Supreme Court, contrary to principles of statutory construction, limited their interpretation of "all criminal homicides" to first degree murder convictions. If the Legislature had intended to limit comparison and review to first degree murder cases they would have so stated and provided limiting language within the statute.

Petitioner contends that the basis of review required by LB 711 includes comparison of his own case with all other homicide cases in which charges of first degree murder could have been brought or were initially filed but were reduced by plea bargain or by a finding of second degree murder by the jury.

In the case at bar, Petitioner was convicted of a felony-murder for which he received the death penalty. Comparison of Petitioner's case with other felony-murder cases reveals that Petitioner received a greater sentence than those cases with the same or similar circumstances.

In State v. Scott, 200 Neb. 265, 263 N.W.2d 659 (1978), the defendant was charged with murder in the perpetration of or an attempt to perpetrate a robbery. In the course of the attempted robbery, the defendant shot and killed a ninety-two year old man and wounded his eighty-three year old wife. Defendant received a sentence of life imprisonment. State v. Prim, 201 Neb. 279, 267 N.W.2d 193 (1978), involved a defendant charged with first degree murder for the shooting death of a defenseless operator of a gas station during

the commission of a robbery. Like the defendant in Scott, Prim received a life sentence. In another recent felony-murder case, a brother and sister robbed and killed a motorist who had given them a ride. The defendant-brother was sentenced to life upon conviction for felony-murder. State v. Simpson, 200 Neb. 823, 265 N.W.2d 381 (1978).

Not all felony-murder cases in which the defendant received a life sentence have been appealed to the Nebraska Supreme Court. Like the aforementioned cases, defendants were convicted of felony-murder, as the Petitioner in the case at bar, but unlike Petitioner, received life imprisonment. For instance, in State v. Brown, Doc. 88, p. 625 (D. Ct. Douglas County 1974), the defendant killed his victim during a robbery and received a life sentence. In another case a sixteen year old abducted a store owner and shot him seventeen times after robbing him. Defendant likewise received a life sentence. State v. Schaeffer, Doc. 28, P. 279 (D. Ct. Hall County 1977). In State v. Rowert, Case No. 2805 (D. Ct. Platte County 1977), a twenty-three year old talked the victim into leaving the bar and drove him outside of town where he robbed the victim, slit the victim's throat and then decapitated him. Defendant was also sentenced to life imprisonment. In State v. Marshall, Doc. 48, P. 262 (D. Ct. Lancaster County 1978) the defendant, a twenty year old working in a Lincoln flower shop, robbed the owner and in the course of the robbery struck the store owner on the head several times with a metal bar. The blows inflicted upon the victim by the defendant were attributed as the cause of death. Defendant was sentenced to life imprisonment. In State v. Peery, 199 Neb. 656, 261 N.W.2d 95 (1977) defendant shot and killed a coin shop owner during the commission of a robbery. Defendant was sentenced to death.

The previously cited cases in which the defendants were convicted of felony-murder and received life sentences are difficult to distinguish from the Petitioner's case in which he received the death sentence.

Imposition of the death penalty in the instant case clearly contravenes the intent of the Legislature that each case should produce a result similar to that arrived at in other cases with the

same or similar circumstances.

Even less distinguishable from Petitioner's case than the aforementioned felony-murder cases are those cases in which the defendant received a life sentence for conviction of 2nd degree murder, obtained as a result of a plea bargain, reducing the initial charges of first degree murder to second. In many of those cases, a first degree murder charge could have been upheld. For example, in State v. Price, 202 Neb. 308, 275 N.W.2d 92 (1979), the Court in reviewing the defendant's life sentence imposed for conviction of a second degree murder for the beating death of a two year old infant, determined that the evidence in the case was sufficient to support a first degree murder charge to the jury. The evidence conclusively showed that the defendant had repeatedly battered and tortured the child which resulted in the child's death. The Nebraska Supreme Court called defendant's crime "shocking" and "indicative of a depraved mind." Id. at 323.

In State v. Braasch, 196 Neb. 240, 242 N.W.2d 119 (1976), defendant was originally charged with first degree murder for the shooting death of his shop foreman. A plea bargain was struck which reduced defendant's charge to second degree murder to which defendant pleaded guilty and was sentenced to life imprisonment. In responding to defendant's contention that the sentence was excessive, the Nebraska Supreme Court commented that the defendant's crime was "cold, calculated, premeditated, violent murder (and that) the defendant was not even remorseful about that murder." Id. at 242. The Court, in upholding the defendant's life sentence, determined that "the facts would justify a conviction for first degree murder." Id.

Similarly in State v. Yarbrough, 199 Neb. 41, 255 N.W.2d 874 (1977), the defendant was originally charged with first degree murder for killing a woman while engaged in a sexual assault in the first degree. Again, defendant's first degree murder charge was reduced to second degree by plea bargain. Yarbrough, like the other defendants previously mentioned, received a life sentence for commission of a "brutal and vicious crime." Id. at 43.

The Nebraska Court again determined in State v. Walker, 197

Neb. 314, 248 N.W.2d 759 (1976) that defendant's shooting death of his wife, which resulted from four shots, one with the gun held against her forehead, "would definitely support a conviction for first degree murder. . ." Id. at 315. The Petitioner in the case at bar also shot his victim at close range as did Walker. However, Walker received a life sentence. Petitioner, on the other hand, received a sentence of death.

Petitioner again asserts that the drafters of LB 711 clearly expressed their intent that review of an individual's case under LB 711 includes comparison with all other criminal homicides, meaning all homicides in which a first degree charge could have been brought or at minimum, as interpreted by the Nebraska Supreme Court in Welsh, to include "any other case in which first degree murder was charged." Welsh, supra, at 253. Braasch was originally charged with first degree murder as were Walker and Yarbrough. Likewise in Price, the evidence, as noted by the Court, would have supported a charge of first degree murder. These cases are examples of criminal homicide cases which the Legislature sought to include in the Supreme Court's review of criminal homicide cases involving similar charges and circumstances.

A discrepancy exists between the aforementioned cases and the case at bar as to the charge and ultimate sentence imposed despite the fact that in all instances of murder herein discussed, the murders were "totally unnecessary, meaningless and wasteful . . . deliberate, intentional killing of another." Williams, supra, at 88. However, due to acceptance of a plea bargain or failure to find the defendant guilty of first degree murder but that of second degree, a sentence of death cannot be imposed. The crime involved in all instances of review under LB 711 is "homicide" which may be defined in any of the following ways, as the "killing of any human creature" or "killing of one human being by the act, procurement or omission of another" or as "the act of a human being in taking away the life of another human being." Black's Law Dictionary 661 (Revised 5th ed. 1979). These definitions are admittedly as broad as "all criminal homicides" is inclusive as a means of review. The review and task

involved in such an undertaking is surely arduous and time consuming. However, the Legislature has mandated procedure to provide for such through the offices of the State Court Administrator. The Nebraska Court cannot construe the language of the statute to limit the basis of review contrary to the intent and language of the Legislature. The Nebraska Supreme Court has in the past abided by the following standard of statutory construction:

> In considering the statute before us we are required to observe the rule that the policy or impolicy of the statutory provision is the exclusive function of the Legislature and not of the courts. We must accept the statute as we find it and no requirement which is not in the statute will be or can be considered to govern our action. The general rule is that where the language of the Statute is unambiguous there is no necessity for construction and courts cannot change the clear language of the statute.

A-1 Finance Co., Inc., v. Nelson, 165 Neb. 296, 306 85 N.W.2d 687 (1957). The Nebraska Supreme Court should apply this principle of statutory construction to the instant case in order to effectuate the review and comparison which Nebraska law grants the Petitioner as a recipient of the death penalty.

C. CONTRARY TO NEB. REV. STAT. §29-2521.03, THE DEATH PENALTY IMPOSED IN THE INSTANT CASE IS GREATER THAN THE SENTENCE IMPOSED IN HOMICIDES WITH THE SAME OR SIMILAR CIRCUMSTANCES: THEREFORE PETITIONER REQUESTS THAT THIS COURT REDUCE HIS SENTENCE OF DEATH TO LIFE IMPRISONMENT AS AUTHORIZED BY SECTION 29-2521.03 and 29-2524.

Petitioner points to section 29-2521.03 which states that "(n)o sentence of death imposed shall be greater than those imposed in other cases with the same or similar circumstances." Through previous discussion of other homicide cases, particularly those which would have supported a charge of first degree murder, Petitioner has established the similarity of facts and circumstances which exist in Petitioner's offense and in other Nebraska homicide cases. Petitioner received a sentence of death whereas others who have committed similar offenses under comparable circumstances have received a sentence of life.

Nebraska law demands a comparative review of Petitioner's case with all cases involving criminal homicide. The review contemplated by the Legislature goes beyond a review of aggravating and mitigating circumstances to include the facts and circumstances of each and every homicide. By requiring the Su-

preme Court to review the charges filed, the crime for which the defendant was convicted and the sentence imposed, the Legislature clearly was concerned with the disproportionate and unevenhanded imposition of the death penalty. The information required by the Legislature for Supreme Court review is stipulated in section 29-2524.01 and includes information from which the Nebraska Supreme Court could easily ascertain whether or not the sentence imposed in a given case is greater than that imposed in other cases with the same or similar circumstances.

Neb. Rev. Stat. §29-2521.03 expressly authorizes the Nebraska Supreme Court to reduce any sentence which it finds not to be consistent with section 29-2521.01 to 29-2521.04; 29-2522 and 29-2524. Neb. Rev. Stat. §29-2524 reiterates the right of the Supreme Court to reduce a sentence of death to a sentence of life imprisonment. Petitioner respectfully submits that based upon the allegations set forth in his petition that his Constitutional rights have been infringed so as to render his judgment void or voidable under the United States Constitution. As Neb. Rev. Stat. §29-3001 authorizes resentencing of a prisoner if discharge does not appear appropriate. Petitioner submits that reduction of his capital sentence to life imprisonment is a form of relief authorized by Neb. Rev. Stat. §29-3001.

II.

THE ARBITRARY AND CAPRICIOUS INFLICTION OF THE DEATH PENALTY IN THE INSTANT CASE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT TO THE U.S. CONSTITUTION AND UNDER ARTICLE I, SECTION NINE OF THE NEBRASKA CONSTITUTION.

Failure to compare Petitioner's case with other criminal homicides, as mandated by the Nebraska Legislature, in which the evidence would support a charge of first degree murder necessarily raises the question as to whether the death sentence imposed in the instant case was rendered in an arbitrary and capricious manner contrary to Supreme Court holdings reached in Furnam and Gregg. In Gregg v. Georgia, 428 U.S. 153, 188, 189 (1976), the Court concluded that in "a matter so grave as the determination of whether a human life should be taken or spared," it would be both necessary and sufficient to insist on sentencing procedures that would minimize or

eliminate the "risk that the (death penalty) would be inflicted in an arbitrary and capricious manner." The Nebraska Legislature believed that the state's sentencing procedures, which includes the weighing of aggravating circumstances set forth in section 29-2523-2343, in and of themselves, were inadequate to insure the uniform imposition of the death penalty. In order to guarantee the even-handed imposition of the death penalty as contemplated by the United States Supreme Court in Gregg and Furnam, the Legislature enacted LB 711.

Petitioner has pointed to but a handful of Nebraska homicide cases in which the defendant received a life sentence although the Nebraska Supreme Court determined that the evidence would have supported a first degree murder charge in noting the extreme cruelty and atrociousness of the offense. Factual distinctions between those cases and the Petitioner's are negligible and evidences the lack of a rational, constitutional basis from which to distinguish the small handful of cases in which the death penalty has been imposed. This basis of distinction, differentiating between capital and noncapital cases as required by the United States Supreme Court in Furnam, is, under recent Nebraska Supreme Court decisions, impossible as the Court, contrary to the Legislature's intent, has limited review of capital cases to comparison with only other first degree murder cases.

The narrow base of comparison adopted by the Nebraska Supreme Court contravenes the express intent of the Legislature to broaden the base of comparative review. Consequently, this limited base of review fails to minimize the risk of arbitrarily imposing the death sentence which the United States Supreme Court concluded in Furnam, is constitutionally intolerable. As suggested by Justice Marshall in his opinion in Godfrey, Godfrey v. Georgia, ___ U.S. ___, 100 S. Ct. 1759 (1980), perhaps the "task of eliminating arbitrariness in the infliction of capital punishment is proving to be one which our criminal justice system - and perhaps any criminal system - is unable to perform." Id. at 1771.

The Petitioner urges this Court to reconsider the propriety

of his death sentence under these circumstances where, in the absence of constitutionally mandated safeguards within the capital sentencing scheme and given the inherent difficulty of uniformly inflicting capital sentence, the death sentence may be indiscriminately imposed, thereby rendering such sentence of death, cruel and unusual punishment. Petitioner further contends that to impose the death penalty in the instant case when death is rarely meted out to those who have committed crimes equally as egregious if not more so, than Petitioner's, constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution and under Nebraska's analogous constitutional provision contained in Article I, Section 9.

Respectfully submitted,

Stanley D. Cohen

Stanley D. Cohen
Attorney for Petitioner

446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980), raises new and additional constitutional issues which are applicable in this case.

We have recently held that the death penalty, when properly imposed, does not violate either the U.S. or Nebraska Constitution. State v. Anderson and Hochstein, 207 Neb. 51, 296 N.W.2d 440 (1980). The holding in Godfrey is not applicable in this case for the reasons set out in the very recent case of State v. Harper, ante p. _____, _____ N.W.2d _____ (1981).

The remaining issues and contentions of the defendant have been presented, considered, and determined in the direct appeal of the convictions involved here.

A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated. State v. Svoboda, 199 Neb. 452, 259 N.W.2d 609 (1977); State v. Holtan, 205 Neb. 314, 287 N.W.2d 671 (1980).

The judgment of the District Court was correct and is affirmed.

AFFIRMED.

81-5157

RECEIVED
JUL 2 1 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1981
No. 81-_____

Supreme Court, U.S.
FILED
JUL 23 1981
Alexander L. Stevas, Clerk

WESLEY H. PEERY,
Petitioner,
vs.
THE STATE OF NEBRASKA,
Respondent.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

TO: THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

STATE OF NEBRASKA )
) ss.
COUNTY OF LANCASTER )

I, Wesley H. Peery, Petitioner herein, after first being duly sworn on oath, depose and say, in support of my Motion for Leave to Proceed In Forma Pauperis, without prepayment of fees or costs or securities therefore, state to the best of my knowledge and belief as follows:

1. I am the Petitioner in the above-entitled action;

2. On April 30, 1976, I was found guilty of murder in the first degree and robbery by force committed in the perpetration of a robbery by a jury in Lancaster County District Court, Lincoln, Nebraska, and on June 21, 1976, was sentenced to death by electrocution by a three-judge panel;

3. On December 28, 1977, the Supreme Court of the State of Nebraska affirmed my sentence and conviction and on February 28, 1978 ordered my date of execution, which date was set for June 8, 1978; my execution date was stayed pending appeal to the United States Supreme Court;

4. Following denial of my Writ of Certiorari by the United States Supreme Court, I entered a motion for new trial based upon newly discovered evidence. The Nebraska Supreme Court rejected my motion and ordered my execution date for February 15, 1980; the order of execution was stayed pending my application for post conviction relief;

5. On April 24, 1981, the Supreme Court of the State of Nebraska affirmed the Lancaster District Court ruling, denying my Petition for post conviction relief. The Supreme Court of the State of Nebraska ordered my date of execution for August 20, 1981;

6. I am currently incarcerated in the Nebraska Penal and Correctional Complex and have no funds or personal or real property to provide fees, costs or security therefore as may be required in seeking review to the Supreme Court of the United States;

7. The nature of this action is the Petition for Writ of Certiorari seeking review of the Nebraska Supreme Court's denial of my application for post conviction relief which was premised on the Nebraska Supreme Court's failure to review and compare my case with all criminal homicides as statutorily mandated by Neb. Rev. Stat. §§29-2521.01 to 29-2521.04. The Nebraska Supreme Court's failure to invoke this statutory review process violates my rights to due process and equal protection under the 14th Amendment to the Constitution of the United States. I believe I am entitled to the redress that I seek in the above-captioned case and that the questions presented herein are substantial and not frivolous;

8. From my incarceration on June 25, 1975 until the present I have been represented by Stanley D. Cohen who has been appointed counsel for me based on my Affidavit of Poverty filed in the case to the effect that I was indigent and unable to secure private counsel or pay the costs of my defense.

FURTHER Affiant sayeth naught.

Wesley H. Peery, Petitioner

Subscribed and sworn to before me this 20th day of July, 1981.

GENERAL NOTARY - State of Nebraska
JAMES R. LYONS
My Comm. Exp. July 7, 1983

James R. Lyons
Notary Public

81-5157

Supreme Court, U.S.
FILED
JUL 23 1981
Alexander L. Stevas, Clerk

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1981
No. 81 _____

| | |
|---|---|
| WESLEY H. PEERY, | ) |
| Petitioner, | ) |
| vs. | ) |
| THE STATE OF NEBRASKA, | ) |
| Respondent. | ) |

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

TO: THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES
OF THE SUPREME COURT OF THE UNITED STATES

COMES NOW the Petitioner, Wesley H. Peery, and moves the Supreme Court of the United States for leave to proceed in forma pauperis pursuant to 28 USC 1915 and Rule 53 of the Rules of the Supreme Court of the United States. In support of this motion, Petitioner respectfully shows that:

1. Petitioner Wesley H. Peery was convicted of murder in the first degree and robbery by force by a jury in Lancaster County District Court, Lincoln, Nebraska on April 30, 1976.

2. Petitioner Wesley H. Peery was thereafter sentenced to death by electrocution by a three-judge panel in Lancaster County District Court on June 21, 1976 on the felony murder charge and 16 to 50 years on the charge of robbery by force, said sentence to run consecutively to the sentence of death.

3. Petitioner thereupon appealed to the Supreme Court of the State of Nebraska and the sentences and convictions were upheld on December 28, 1977. The Petitioner's motion for rehearing was denied on February 22, 1978. Petitioner filed a Petition for Writ of Certiorari to review the decision of the Supreme Court of the State of Nebraska. The United States Supreme Court denied said Petition on October 2, 1978.

4. Thereafter, Petitioner filed a motion for new trial based upon newly discovered evidence. The Supreme Court of the State of Nebraska denied Petitioner's motion on January 8, 1980.

5. Thereupon, Petitioner filed a motion for post conviction relief pursuant to the Nebraska Post Conviction Relief Act. On April 24, 1981, the Supreme Court of the State of Nebraska affirmed the decision rendered by the District Court of Lancaster County, denying Petitioner's motion.

6. Petitioner, along with filing the motion for leave to proceed in forma pauperis and attached affidavit, has filed his Petition for Writ of Certiorari to review the decision of the Supreme Court of Nebraska.

7. Petitioner is unable to pay the costs or give security therefore in the Supreme Court of the United States, as evidenced by the attached affidavit incorporated herein by reference.

WHEREFORE, Petitioner, Wesley H. Peery, prays for an order allowing him to proceed in forma pauperis in the above-entitled matter.

Respectfully submitted,

WESLEY H. PEERY,
Petitioner

By: Stanley D. Cohen
Stanley D. Cohen
Court Appointed Counsel
for Petitioner
4730 Meredeth
Lincoln, NE 68506